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IN THE

Supreme Court of the United States

October Term 1963
No. 111

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SERVETTE, INC.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Objection by Respondent, Servette, Inc., to Motion for Leave to File a Brief Amici Curiae by American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, Servette, Inc., begs leave of this Honorable Court to object to the Motion for Leave to File a Brief Amici Curiae by the American Federation of Television and Radio Artists, San Francisco Local, and the National Association of Broadcast Employees and Technicians, Local 55.

The sole issue before this Court with respect to Section 8(b)(4)(ii) of the National Labor Relations Act is whether a boycott by a union of neutral parties is

exempted from violating the Act by virtue of the second proviso to that section. Amici Curiae seek to raise two additional questions, to which Respondent objects on the following grounds:

1. Neither question is timely raised to the Court in accordance with its long-standing rule that issues shall come to the Court only after they are orderly adjudicated in the courts below.

The court of appeals in this case ruled in response to a motion for clarification filed by the National Labor Relations Board that these issues were not properly before the court. They were raised neither by the Board in its opinion nor by either party to the court of appeals in briefs or argument. The court stated that "the first intimation of such grounds in the instant case was raised on the motion for clarification." [R. p. 105; 313 F.2d 66, 67.] Amici Curiae are incorrect in suggesting that the court refused to consider these questions solely on the ground of Section 10(e) of the Act. Before noting the applicability of that section, the court relied on its holding in *Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423 (9th Cir. 1962), in which the court ruled:

> It is sound policy to require that all claims be presented to the trial court, and not raised for the first time on appeal, nor, a fortiori, as herein, in a petition for rehearing on appeal. This requirement sets the scope of the lawsuit, thereby preventing piecemeal litigation and consequent waste of the time of both trial and appellate courts. It assures that the opposing party will know the claims he must meet. It gives the appellate court

> the benefit of the district court's wisdom, and it prevents a litigant from asserting before this Court a claim which he deliberately chose, for reasons of strategy, not to assert below.

(313 F.2d 423, 425.) Clearly, Amici are in error in asserting that the court below primarily grounded its refusal to consider these questions on Section 10(e) of the Act. That court quite properly held that the failure to present these issues prior to the motion for clarification precluded their consideration. Manifestly, then, even greater reasons argue against this Court's entertaining these questions now.

See also,

Rescue Army v. Municipal Court, 331 U. S. 549 (1947);

United States v. Singer Mfg. Co., 374 U. S. 174, 175 n. 1 (1963).

2. Amici Curiae should not be allowed to inject into this case issues not raised by the parties.

Amici Curiae concede that neither the National Labor Relations Board nor the Respondent has raised to the Court the issues that Amici seek to raise. (Motion for Leave to File a Brief Amici Curiae, p. 5, par. 4.) Briefs amici curiae are not favored by the Court (United States Supreme Court Rules, Rule 42, Section 1); and in any event Amici Curiae should not be allowed to inject new issues into this case. *Kretch v. United States*, 364 U. S. 361, 370 (1960).

3. The asserted constitutional question is premature and not timely raised, and thus does not conform to this Court's policy against unnecessary consideration of constitutional issues.

The question whether a boycott is illegal does not raise a first amendment issue. If it did, every case involving the construction of a statute prohibiting boycotts—the Sherman Act, for example—would present a free speech issue. This Court has repeatedly held that it will not for the convenience of the parties anticipate constitutional issues even where they might otherwise have been properly raised. *United States v. Hayman,* 342 U.S. 205 (1952); *Parker v. County of Los Angeles,* 338 U.S. 327 (1949); *Honeyman v. Hanan,* 300 U.S. 14 (1937). This Court analyzed its policy in *Rescue Army v. Municipal Court,* 331 U.S. 549 (1947), when it stated, at page 570:

> Moreover the policy is neither merely procedural nor in its essence dependent for applicability upon the diversities of jurisdiction and procedure, whether of the state courts, the inferior federal courts, or this Court. Rather it is one of substance, grounded in considerations which transcend all such particular limitations. Like the case and controversy limitation itself and the policy against entertaining political questions, it is one of the rules basic to the federal system and this Court's appropriate place within that structure.

4. Moreover, the factual record in this case makes the argument of Amici Curiae in regard to the "coercion" issue moot.

Even if the arguments advanced by Amici Curiae were otherwise properly before this Court, their position that handbilling and threats thereof do not *per*

se constitute "coercion" within the meaning of Section 8(b)(4) is misplaced. Not only do both the Board and Respondent disagree with Amici Curiae on this point, but the stipulated facts in the record in this case show that the Union's actions did have a direct and detrimental economic effect on neutral parties, thus placing this case in a different posture than *N.L.R.B. v. Fruit & Vegetable Packers, No. 88,* and rendering the argument of Amici Curiae in this regard inapplicable.

(5) The very questions raised by Amici Curiae are before the National Labor Relations Board in another action and await decision in the orderly process of judicial administration.

Amici Curiae are parties to N. L. R. B. Case No. 20-CC-234, which is presently before the National Labor Relations Board upon remand by the Court of Appeals for the Ninth Circuit to the Board for its consideration of the issues raised by Amici Curiae. *Great Western Broadcasting Corporation v. N. L. R. B.*, 310 F.2d 591 (9th Cir. 1962).

Amici Curiae not only attempt to anticipate those issues here, but to circumvent their consideration by the National Labor Relations Board and the Ninth Circuit Court of Appeals in the *Great Western Broadcasting* case.

The foregoing considerations present the Court with several substantive reasons for denying leave to Amici Curiae to file their brief. In this case the presenta-

tion of their issues would be untimely and would prevent the Court from having the wisdom and judgment of the lower courts. In *Great Western Broadcasting,* the lower courts would be deprived of their usual function, to hear and judge these issues in the orderly course of judicial administration.

Wherefore, Respondent respectfully requests that the motion be denied.

Dated: October, 1963.

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